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Nos. 04-1203 and 04-1236

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, PEOPLE FOR THE AMERICAN WAY FOUNDATION & THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, and to what extent, Title II of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), validly abrogates state sovereign immunity for suits by prisoners with disabilities challenging discrimination by state-operated prisons?

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INTEREST OF *AMICI CURIAE* [1]

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), National Asian Pacific American Legal Consortium ("NAPALC"), People for the American Way Foundation ("People For") and The National Association for the Advancement of Colored People ("NAACP") are nonprofit organizations dedicated, among other goals, to eradicating discrimination affecting racial, and ethnic minorities, women, and other targeted populations. *Amici* have worked closely with Congress to advance legislation on the issue of discrimination. Many of the *amici* represent victims of discrimination who will be adversely affected by any restriction on the power of Congress to legislate in an effort to fight discrimination. For *amici*, expanding the reach of the Eleventh Amendment and curtailing Congress' powers under § 5 signifies a threat to the ability of its constituencies to seek redress for violations of their federally protected civil rights. Accordingly, the following *amici*, with the consent of the Parties, submit this Brief in support of Petitioner's argument that 42 U.S.C. §§ 12131-12132, Title II of the Americans With Disabilities Act, was validly enacted pursuant to the power of Congress under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys in the effort to insure the civil rights of all Americans. The Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before the Court involving the scope of Congress' legislative power. *See, e.g., Tennessee* v. *Lane*,

1. Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staff, or their counsel made monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

541 U.S. 509 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S.721 (2003); *Medical Bd. of California* v. *Hason*, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999).

The NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, NAPALC and its Affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy advocacy and community education on discrimination issues. NAPALC was an *amici* in support of respondents in *Tennessee* v. *Lane*, 541 U.S. 509 (2004) and likewise the question presented by this case is of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Americans in this country.

People For is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. People For has supported the Americans with Disabilities Act of 1990, and joins this brief to help vindicate Congress' power under § 5 of the Fourteenth Amendment and its ability to protect individuals with disabilities against discrimination by states and state agencies. People For has also been involved as *amicus curiae* in other briefs on this issue, including *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

The NAACP is a non-profit corporation founded in 1909 and seeks to ensure the political, educational, social and economic equality for all persons and to eliminate racial hatred and discrimination. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress' broad powers under § 5 of that Amendment to pass legislation that in certain circumstances abrogates state sovereignty immunity.

STATEMENT OF THE CASE

In 1995, Petitioner Tony Goodman, a paraplegic who uses a wheelchair, was incarcerated in the Georgia State Prison (GSP), where he was confined to a cell measuring twelve feet long by three feet wide. The size of the cell prevented him from turning his wheelchair, rendering him effectively immobile for twenty-three to twenty-four hours a day. Mr. Goodman's placement in the twelve by three cell was unrelated to any penological justification. Because the prison did not have accommodations to allow Mr. Goodman access to prison facilities, Mr. Goodman could not use the GSP chapel or law library, and was excluded from the benefits of GSP's educational services, including vocational training, college programs, and recreational activities.

GSP lacks wheelchair-accessible routes or rooms, has no transportation facilities equipped for inmates with disabilities, and lacks facilities for disabled inmates to perform daily functions, including personal grooming, hygiene, and drinking. Because the toilet and showers are without support bars, Mr. Goodman was unable to use them without assistance. As a result, Mr. Goodman was forced to sit in his own bodily waste for long periods of time and suffered repeated, severe injuries when he attempted to use the toilet. Mr. Goodman repeatedly requested accommodations so that he could use these and other prison facilities. His requests were denied.

In addition to the lack of reasonable accommodations for his paraplegia, GSP also denied Mr. Goodman adequate medical care following his injuries, which included an epileptic seizure, a broken right toe, a crushed right knee, and injuries to his left arm, head, neck, back, stomach, and legs. Prison officials also excluded him from appropriate medical care, counseling services, and rehabilitative services.

Mr. Goodman filed this federal action alleging Eighth Amendment violations under § 1983 and unlawful disability discrimination under Title II of the Americans with Disabilities Act of 1990 ("ADA"), as amended, 42 U.S.C. § 12131, *et seq.* ("Title II"). The District Court, adopting the recommendations of a magistrate, dismissed his § 1983 claim but allowed his Title II claims to proceed. The magistrate judge thereafter granted summary judgment on Mr. Goodman's Title II claims. Mr. Goodman appealed, and the United States intervened to defend the constitutionality of Title II's abrogation of the state's Eleventh Amendment immunity. While the appeal was pending, this Court rendered its decision in *Tennessee* v. *Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004). The Eleventh Circuit reversed the dismissal of Mr. Goodman's Eighth Amendment claim and affirmed the dismissal of Mr. Goodman's Title II claims for monetary damages on Eleventh amendment grounds, relying, without discussion, on its decision in *Miller* v. *King*, 384 F.3d 1248 (2004), which held that "Title II, as applied to prisons, would substantively and materially rewrite the Eighth Amendment." *Miller*, 384 F.3d at 1273. Thereafter, this Court granted Petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

Pursuant to its power to enforce § 5 of the Fourteenth Amendment, Congress purposefully abrogated the states' Eleventh Amendment immunity when it enacted Title II. Congress recognized and sought to address the pervasive and widespread violations of the due process and equal protection rights of individuals with disabilities by the states. Title II operates to provide individuals with disabilities access to the courts, to protect them from cruel and unusual punishment, and to enable them to participate fully in educational and other government programs. Because these important constitutional rights were at stake, Congress had

wide latitude to construct legislation to remedy existing state discrimination against individuals with disabilities and to prevent further discrimination.

Under the congruence and proportionality test used in *Lane* and *Garrett*, Title II's abrogation of the states' Eleventh Amendment immunity is valid. First, as recognized in *Lane*, the legislative history behind Title II is compelling, well-defined, and explicit, and includes findings involving discrimination against prisoners with disabilities.

Second, the scope of Title II is no broader than necessary to achieve its critical purposes. As the Court instructed in *City of Boerne* v. *Flores*, 521 U.S. 507, 530 (1997), "[t]he appropriateness of remedial measures must be considered in light of the evil presented." The scope of permissible remedial measures is broadened here, because the discrimination Congress and the Executive addressed in enacting Title II includes the exercise of fundamental rights. Congress acted in response to a widespread pattern of discrimination by states against individuals with disabilities. Congress tailored Title II to remedy these specific constitutional violations, providing a series of measures designed to blunt the impact Title II compliance would have on the states. Title II therefore meets the congruence and proportionality test.

Under the more deferential legitimate penological purpose standard set forth in *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), GSP can offer no legitimate penological purpose for its refusal to provide prisoners with disabilities reasonable access to prison facilities such as the law library and the chapel. Questions of cost – the most likely justification are more appropriately addressed in the application of the ADA's reasonable-accommodations test to particular circumstances than in the analysis of Congress' power under § 5. Both Title II itself and the implementing regulations take cost into

account, and provide that a state need not make fundamental alterations to its programs.

When Congress acts to protect such fundamental rights as access to courts, a congruence and proportionality test incorporating rational basis review – as was applied in *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000), *City of Boerne* and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001) – is an inappropriate measure of Congress' constitutional authority. *See Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 736-37 (2003) (acknowledging that Congress has broad discretion to legislate to enforce constitutional principles that invoke a heightened level of scrutiny of state conduct). Instead, as it historically has done with legislation enacted to remedy the effects of discrimination invoking heightened scrutiny, the Court should apply the deferential rational means test derived from *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and applied in cases such as *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act of 1965).

While *amici* submit that Title II passes the congruence and proportionality test in its applications to prisons, *amici* do not endorse that test as proper for review of *any* legislation. For the reasons discussed in dissenting opinions in *Garrett* and *Kimel*, *amici* respectfully submit that this standard is premised on an unworkable view of the legislative process, effectively requires Congress to alter the way in which it legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress' legislative procedure. *Amici*, therefore, respectfully urge the Court to return to its prior rational means standard derived from *M'Culloch*.

ARGUMENT

I. TITLE II OF THE ADA GUARANTEES THE FUNDAMENTAL RIGHTS AND LIBERTIES OF INDIVIDUALS WITH DISABILITIES.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2003). In enacting Title II, Congress sought to correct and prevent the unequal treatment of persons with disabilities by requiring states and other public entities to make "reasonable modifications" to their services and programs, so as to render them accessible. 42 U.S.C. § 12131(2). In affirming the constitutionality of Title II in *Lane*, this Court recognized the systemic discrimination faced by individuals with disabilities in access to public programs: "Congress enacted Title II against the backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. at 524. The unequal treatment cited in *Lane* was not confined to historical offenses against human dignity such as forced sterilization, but persisted, as Congress found, "in such critical areas as . . . *institutionalization*," 42 U.S.C. § 12101(a)(3), a finding this Court has noted "can be thought to include penal institutions." *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U.S. 206, 211 (1998).

Title II's requirement of reasonable modifications is designed to prevent deprivations of federal constitutional rights, not only in circumstances where the state's differential treatment of persons with disabilities amounts to irrational discrimination, but also where the inaccessibility of state services or programs impinges on a fundamental right

guaranteed by the Fourteenth Amendment. *Lane*, 541 U.S. at 522. The Due Process Clause incorporates and applies to the states most of the constitutional limits on governmental action embodied in the First, Fourth, Fifth, Sixth, and Eighth Amendments. *See Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968) (articulating the doctrine of incorporation).

This Court has "insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984). As in *Lane*, the allegations in the present case involve fundamental constitutional rights. Mr. Goodman claims that he was denied access to the law library and to the chapel, that his conditions of confinement amount to cruel and unusual punishment, and that prison officials were deliberately indifferent to his serious medical needs. These allegations implicate the right of access to the courts considered in *Lane*, see *Lewis* v. *Casey*, 518 U.S. 343 (1996) (confirming that the right of reasonable access to legal materials is a part of the right of access to the courts), as well as rights protected under the First Amendment, *See Cruz* v. *Beto*, 405 U.S. 319 (1972) (holding that prisoners have a First Amendment right to "reasonable opportunities" to practice their religion while incarcerated) and the Eighth Amendment, *see Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (holding that the deliberate indifference of state custodial officials to an inmate's serious medical need violates the Eighth Amendment).[2] As this Court's precedents

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2. Mr. Goodman also claims that these deprivations occurred as a result of his transfer to GSP from the medical prison. A transfer to significantly more adverse conditions of confinement may also implicate procedural due process. *See Wilkinson* v. *Austin*, 125 S.Ct. 2384, 2387 (2005) (holding that a liberty interest protected by the Due Process Clause may be created by a transfer that "'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (quoting *Sandin* v. *Conner*, 515 U.S. 472, 484 (1995)).

show, these rights are not fundamentally inconsistent or incompatible with incarceration. It was against this backdrop of pre-existing constitutional protections that Congress enacted Title II.

II. UNDER THE ANALYSIS SET FORTH IN *LANE*, TITLE II IS APPROPRIATE LEGISLATION UNDER § 5 OF THE FOURTEENTH AMENDMENT.

Title II is a congruent and proportional response to the states' documented history of discrimination against individuals with disabilities. Under the framework set out in *Boerne* and clarified in *Lane*, after determining that Congress unequivocally expressed its intent to abrogate the states' immunity, a court turns to whether Congress properly exercised its power to abrogate.[3] To answer this question, the Court must first "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 521, by reference to the historical experience reflected by Title II. Next, the Court must determine whether the legislation is congruent and proportional to the wrong identified by Congress.

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3. The first step of this analysis questions whether Congress explicitly expressed its intent to abrogate the states' Eleventh Amendment immunity. *See Lane*, 541 U.S. at 517; *Kimel*, 528 U.S. at 73; *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) The Act specifically provides that the states are not immune from suit under the Eleventh Amendment for violations of the ADA. 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

A. Title II Is Intended to Guarantee Individuals with Disabilities Equal Opportunity to Obtain Vital Services and to Exercise Fundamental Rights and Liberties.

In accordance with *Lane*, it is first important to "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 541 U.S. at 521. As discussed in Part I above, Title II is intended to prohibit and remedy the infringement by the government of the fundamental rights and liberties of individuals with disabilities. These fundamental rights and liberties, which frequently intersect with the right to equal protection, include the rights involved in this case: the right of access to the courts; the right to freely exercise one's religious beliefs; and the right to be free from cruel and unusual punishment. *Lane*'s holding that Title II is proper § 5 legislation as it applies "to the class of cases implicating the accessibility of judicial services, *Lane* 541 U.S. at 511, is fully applicable to Mr. Goodman's case. Indeed, discrimination such as a state's refusal to provide meaningful access to the courts for individuals with disabilities, a right implicated by Georgia prison officials' refusal to provide reasonable access to GSP's law library, is presumptively unconstitutional under the Due Process Clause and the Equal Protection Clause.

Title II also helps safeguard the equal-protection rights of persons with disabilities, including equal access to governmental processes such as the court system. "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Thus, while Congress' power to enact Title II and to abrogate the states' Eleventh Amendment Immunity was rooted in its authority to enforce

the Due Process Clause of the Fourteenth Amendment, Congress also recognized that Title II would protect the equal protection rights of individuals with disabilities.

Central to this case are deprivations of Eighth Amendment rights resulting from inhumane conditions of confinement. Of all Mr. Goodman's claims, these most poignantly illustrate the disparate burdens that the unyielding application of prison rules can inflict on persons with disabilities. Because of the size and configuration of his cell and the absence of other reasonable accommodations, Mr. Goodman is forced to sit in the same position, facing the same direction, for twenty-three to twenty-four hours a day, without access to windows, in a cell that lacks a toilet he can safely use. *Amici* submit that no state today would think it constitutionally acceptable to confine its able-bodied inmates for all or almost all of every day in cells whose size and configuration prevent them from even turning around, without adequate facilities for disposing of bodily wastes. Yet without enforcement of Title II's requirement that prisons provide reasonable accommodations for his disability, these are the conditions in which Mr. Goodman lives. As this Court has held, Title II protects state prisoners against discrimination suffered by reason of a disability. *Yeskey*, 524 U.S. 206. This protection is, in part, an expression of the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" embodied in the Eighth Amendment. *Gamble*, 429 U.S. at 101.

Consistent with this Court's long-held doctrine that legislation passed to enforce the Fourteenth Amendment may cover "a somewhat broader swath of conduct" than the Amendment itself does, *Garrett*, 531 U.S. at 364, Title II's remedial scheme plainly bars states from treating people irrationally and protects them from infringing fundamental rights. It does not, however, change the contours of existing

constitutional law by requiring courts to apply a legal standard that is inconsistent with this Court's decisions and therefore does not work a "substantive change in constitutional protections." *Cf. City of Boerne*, 521 U.S. at 529. Instead, it merely requires states to administer their programs and services in a manner that reasonably accommodates those persons who, because of a disability, stand at a disadvantage in exercising or defending their rights.

B. Congress Supported Title II With Specific Findings Concerning the Pervasiveness of State Discrimination Against Individuals with Disabilities in the Provision of Programs and Services.

As recognized by the Court in *Lane*, Congress supported Title II with specific findings of the pervasiveness of discrimination against individuals with disabilities. 541 U.S. at 516. The strength of this legislative history is evidenced by Congress' specific findings of persistent discrimination in the provision of public services and accommodations. 42 U.S.C. § 12101(a)(3), (5)–(9).

Congress' finding that individuals with disabilities "occupy an inferior status in our society and are severely disadvantaged socially, vocationally, economically, and educationally" rings true for disabled prisoners just as much as it does for those for whom freedom of mobility and access to public services are more varied. 42 U.S.C. § 12101(a)(7). Indeed, "the text of the ADA provides no basis for distinguishing [prison] programs, services, and activities from those provided by public entities that are not prisons." *Yeskey*, 524 U.S. at 209-10. And references to unequal treatment of disabled prisoners appear in the legislative record cited approvingly in *Lane*.[4] Title II's

4 These incidents include a failure to provide medical and psychiatric treatment; a failure to provide interpretive services for deaf prisoners; and abuse of prisoners with disabilities. *See Garrett*, 531 U.S. at 372 n. 7 and App. C.

protections take on a special significance in the penal context, where an individual is entirely within the custody of the state and is entirely dependent on the state for access to services. The Congressional findings supporting Title II have special weight in the penal context, where all "services, programs, or activities," 42 U.S.C. § 12132, are controlled by the state.

This conclusion is bolstered by the goals Congress sought to achieve in enacting Title II, which include providing "clear, strong, consistent, enforceable standards," 42 U.S.C. §12101(b)(2), and addressing "the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). Prison officials affect the day-to-day lives of disabled prisoners in the provision of various benefits, services, programs, and activities, including educational services, recreational services, health services, public accommodations, and transportation, *see Yeskey*, 524 U.S. at 210 (noting that modern prisons provide inmates with many recreational activities, medical services, and educational and vocational programs).

As demonstrated by Mr. Goodman's inability to access vital prison facilities and services, including those that represent the state-provided means of exercising fundamental rights, the protections embodied by Title II are perhaps no where as crucial as in prison, where "the government's power is at its apex," *Johnson* v. *California*, 125 S.Ct. 1141,1149-50 (2005), and where an individual's access to public services, programs, and activities is wholly within the control of state officials.

C. The Substantive and Remedial Provisions of Title II are Proportional and Congruent to the Rights Protected by the Legislation.

Because Congress has "wide latitude" in defining the bounds of § 5 through prophylactic and remedial legislation, *City of Boerne*, 521 U.S. at 520, the congruence and proportionality analysis does not require an exact match between legislative and constitutional prohibitions. Rather, as noted in *Kimel*, the affirmative grant of legislative power contained in § 5 of the Fourteenth Amendment permits Congress to "remedy and deter" unconstitutional acts that violate § 5, as well as "prohibit[ ] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518).

This Court recently reaffirmed this principle in *Lane*. 541 U.S. at 518; *see also Hibbs*, 538 U.S. at 727-28 (holding that the abrogation of states' Eleventh Amendment immunity by the FMLA was a valid act of Congress under § 5 of the Fourteenth Amendment). As noted in *Lane*, as long as Congress does not attempt to redefine the obligations of the states, Congress may exercise its § 5 power to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." 541 U.S. at 518 (citing *Hibbs*, 538 U.S. at 727-28). Accordingly, "legislation which 'deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.'" *Hibbs*, 538 U.S. at 730 (quoting *City of Boerne*, 521 U.S. at 518).

Title II is congruent and proportional to the evils identified by Congress because it is tailored to remedy these constitutional violations while placing the least burden

possible on states. The appropriateness of Title II should be examined in light of the injuries that Congress was seeking to remedy and prevent. *City of Boerne*, 521 U.S. at 530. As noted, the injuries include the infringement of fundamental rights and liberties guaranteed by the United States Constitution as well as irrational discrimination violative of the Equal Protection Clause. Congress enacted Title II to ensure that individuals with disabilities would not continue to face such discriminatory treatment. Mindful of the burdens a strict requirement of accommodation might impose, however, Congress allowed public entities considerable flexibility in complying with the statute's moderate demands. This is made clear in the statute itself, in the implementing regulations, and in the decisions of this Court interpreting Title II.

In order to comply with Title II, a state need only make "reasonable modifications in policies, practices, and procedures" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as an individual "who, with or without *reasonable* modifications . . . , meets the essential eligibility requirements for the receipt of services") (emphasis added); *Olmstead* v. *Zimring*, 527 U.S. 581, 606 n.16 (1999) (making clear that Title II does not require fundamental alterations in state programs).

Title II's implementing regulations, to which this Court resorted for guidance in *Olmstead*, 527 U.S. at 598, and to which this Court should defer in interpreting the statute, *cf. Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (giving *Chevron* deference to Justice Department regulations implementing the public-accommodation provisions of Title III of the ADA), merely require a public entity to ensure that "when viewed in its entirety, [it] is readily accessible to and usable

by individuals with disabilities." 28 C.F.R. § 35.150(a). This accessibility mandate does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(2). In the case of facilities built before 1992, for which structural change is likely to be difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. 28 C.F.R. § 35.150(b)(1). In the prison context, this may mean making modifications to a small number of prison cells or taking other steps to ensure that prisoners with disabilities have access to vital prison facilities and programs. The implementing regulations explicitly do not require a state to take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3); *see also* 28 C.F.R. §§ 35.130(b)(7), 35.164;

Title II is thus proportional and congruent. It is designed to protect the fundamental rights and liberties of individuals with disabilities; yet it does not require any unreasonable modifications or any fundamental alteration of state programs to achieve that goal. The obligations it imposes on the states are limited, and the states are permitted a great deal of flexibility in meeting them. Therefore, Congress acted within its power to abrogate the Eleventh Amendment immunity of the states.

This result is not altered by the standard of review applicable to some claims of constitutional deprivations in prison. It is well settled that state discrimination implicating fundamental rights and liberties is ordinarily subject to strict scrutiny, *see Harper* v. *Virginia Bd. Of Elections*, 383 U.S. 663, 670 (1996), and must be justified with a compelling

state interest. *See Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (right to custody of one's children); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (right to procreate). This Court has consistently affirmed the principle that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner*, 482 U.S. at 84. Because prisoners retain their constitutional rights inside prison, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez*, 416 U.S. 396, 405- 06 (1974); *see also Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."). Nevertheless, this Court has on occasion upheld prison regulations impinging upon certain fundamental rights of prisoners upon a showing that they bear a reasonable relationship to a legitimate penological purpose. *Turner* v. *Safley*, 482 U.S. 78, 89 (1987); *but see Johnson* v. *California*, 125 S.Ct. 1141 (2005) (holding that strict scrutiny, not the more deferential reasonable penological purpose standard, is the appropriate standard to review a prison's practice of racially segregating prisoners).

This more deferential measure of constitutionality has its basis in the understanding that prison policy is "a task that has been committed to the responsibility of th[e] [legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." 482 U.S. at 85. But this Court has applied the *Turner* standard "*only* to rights that are 'inconsistent with proper incarceration.'" *Johnson*, 125 S.Ct. at 1149 (emphasis in original) (citing *Overton* v. *Bazzetta*, 539 U.S. 126, 131

(2003)). While prisoners necessarily suffer some limitations in their use of the court system, *Lewis* v. *Casey*, 518 U.S. 343 (1996), and in the exercise of their religious rights, *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), it cannot be "inconsistent with proper incarceration" to afford prisoners reasonable and equal access to an established prison law library or a prison chapel, where no penological purpose stands in the way.

In any event, the deferential *Turner* standard is entirely inapplicable to Mr. Goodman's Eighth Amendment claim. *See Johnson*, 125 S.Ct. at 1149 ("[W]e have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison."). Instead, violations of the Eighth Amendment are reviewed using the "deliberate indifference" standard, under which the court determines whether prison officials demonstrated deliberate indifference to the inmates' health or safety. *See Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002) (inmate subjected to cruel and unusual punishment when prison guards handcuffed him to hitching post for disruptive behavior). Judged by that standard, GSP's actions in refusing to provide Mr. Goodman with medical care after he sustained serious injuries and in forcing him to sit in his own bodily waste for long periods of time constitute deliberate indifference. *See Gamble*, 429 U.S. at 104-05 (1996) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment.) (internal citations omitted).

Even as to the rights to which it applies, the *Turner* standard should not be thought to imply a limit on Congress' enforcement power under Section Five of the Fourteenth Amendment, as the rational-basis test was held to do in *Garrett*. In *Garrett*, an insufficient legislative record of state employment discrimination against individuals with

disabilities supported Title I of the ADA. But *Lane* settled that question in the context of Title II, concluding that the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services" supported Congress' chosen remedy. 541 U.S. at 528. The strength of this record gives Congress more latitude in fashioning a proportionate legislative response to remedy these violations.

It would be ironic indeed if the constitutional test set forth in *Turner*, adopted by this Court out of deference to the judgments of the political branches regarding the management of prisons, were to have the unintended doctrinal consequence of reducing this Court's deference to those branches in relation to the protection of the rights of disabled prisoners. It cannot be the law that this Court defers to the political branches only when they act to infringe prisoners' fundamental rights as in *Turner*, but not when they act to protect those rights under § 5 of the Fourteenth Amendment. When Congress acts to protect constitutional rights of prisoners under § 5, it must be presumed to have taken the realities of the penal system into account, and this Court should defer to its judgment on that point.

III. THE RIGOROUS STANDARD OF REVIEW RECENTLY APPLIED TO § 5 LEGISLATION SHOULD BE ABANDONED BECAUSE IT UNDULY COMPROMISES CONGRESSIONAL POWER.

Prior to its 1997 decision in *City of Boerne*, when reviewing § 5 legislation this Court applied a rational means test derived from *M'Culloch* v. *Maryland*. The *M'Culloch* standard requires only a rational relationship between the ends of the legislation and Congress' chosen means. In the words of Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.

M'Culloch, 17 U.S. (4 Wheat.) 316, 421 (emphasis added). The framers of the Fourteenth Amendment echoed this language in authorizing Congress to enforce the Amendment by "appropriate legislation," and this Court glossed their use of that term in *Ex Parte Virginia:*

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

100 U.S. 339, 345-46 (1879). The standards articulated in *M'Culloch* and *Ex Parte Virginia* were expressly equated in

Katzenbach v. *Morgan*. As this Court held there: "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." 384 U.S. at 650. *See also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (same, as to the Fifteenth Amendment); *James Everard's Breweries* v. *Day*, 265 U.S. 545 (1924) (Eighteenth Amendment).

Under this deferential standard, consistently applied by this Court until 1997, the desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, is beyond the scope of the Court's review. All that the Court need determine is whether the legislation is a rational means of enforcing the Fourteenth Amendment's substantive guarantees.

Title II is a rational means of addressing the documented pattern of discrimination by the states against individuals with disabilities. When Congress passed Title II, it was well aware that individuals with disabilities were, among other things, burdened by inaccessible courthouses, inaccessible polling places, inaccessible public transportation, and inaccessible government buildings and agencies. As recognized by the Court in *Lane*, this unequal treatment extends to prisoners with disabilities, who have a long history of being denied reasonable accommodations once incarcerated. *See Lane*, 541 U.S. at 525 n.11. Title II's failure to prevent the type of disparate treatment among prisoners with disabilities that Mr. Goodman has experienced in GSP, *see id.* (citing *LaFaut* v. *Smith*, 834 F.2d 389, 394 (C.A.4 1987) where a paraplegic inmate was unable to access toilet facilities), is testament to the need for such prophylactic legislation in the first instance. *See also Lane*, 541 U.S. at 525 n.11 (citing instances of discrimination faced by

prisoners with disabilities, including a "double amputee forced to crawl around the floor of jail," and a "deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole"). Congress' enactment of Title II is a rational response to this documented history of disparate treatment. Although, as discussed above, Title II is also a congruent and proportional means of addressing discrimination against individuals with disabilities, the Court need not conduct that more exacting analysis. State discrimination affecting a fundamental right is presumptively unconstitutional, and Congress' chosen means of addressing that discrimination need only be rational.

While Title II meets the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett*, *amici* respectfully urge the Court to return to the traditional, deferential standard used in evaluating the validity of all legislation enacted pursuant to Congress' § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress' judgments because "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the congruence and proportionality standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, has insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and has questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, *amici* submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress' legislative function. The Court has noted that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle . . . is it possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. *Beach Communications*, 508 U.S. 307, 308, 315 (1993) (citations omitted). Yet, in determining congruence and proportionality in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, the Court held that substantial evidence of society-wide stereotypes concerning individuals with disabilities, and even discrimination by government officials, did not provide a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of individuals with disabilities. *See id.* at 377-78. And the requirement of a

record showing a pattern of discriminatory state action also implies that Congress' power "to enforce" the Fourteenth Amendment is limited to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, *amici* believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress' legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to the type of deliberation engaged in by judicial and administrative bodies. Accordingly, in many, if not most, cases, no specific, identifiable rationale exists. *See id.* at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that

all the information upon which Congress draws in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rasa* until it conducts on-the-record proceedings," but rather, "grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, *inter alia*, communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measure of the basis for Congress' judgments. More significantly, however, it appears that if Congress were to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress' legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide, respectively, that "[e]ach House may determine the rules of its proceedings" and "shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." U.S. Const. art. I, § 5, cls. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See, e.g., United States* v. *Ballin*, 144 U.S. 1 (1892); *Field* v. *Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Gravel* v. *United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

The Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, reflects two

concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or may be adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the states against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. *Amici* respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress' determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. 356, 382-85 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *M'Culloch*, its

judgment that there exists arbitrary and purposeful state discrimination requiring legislation, and its judgment of what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

Concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress' legislative judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments effected "the expansion of Congress' powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Moreover, the states are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in particular, the states' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the states' sovereignty. *See Kimel*, 528 U.S. at 93-94 (opinion of Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

The standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," U.S. CONST. amend. XIV, § 5, and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means [to be]

adopted and the end to be attained." *Burroughs* v. *United States*, 290 U.S. 534, 548 (1934). This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their rights against a dominant majority. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

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